

OPEN MEETING ITEM

COMMISSIONERS
KRISTIN K. MAYES – Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP



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ORIGINAL

ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

DEC 29 2009

DATE: DECEMBER 29, 2009

DOCKET NO.: T-20567A-07-0662

TO ALL PARTIES:



Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Opinion and Order on:

NEWPATH NETWORKS, LLC.
(CC&N)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

JANUARY 7, 2010

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

JANUARY 12, 2010 and JANUARY 13, 2010

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 KRISTIN K. MAYES, Chairman
4 GARY PIERCE
5 PAUL NEWMAN
6 SANDRA D. KENNEDY
7 BOB STUMP

8 IN THE MATTER OF THE APPLICATION OF
9 NEWPATH NETWORKS, LLC, FOR APPROVAL
10 OF A CERTIFICATE OF CONVENIENCE AND
11 NECESSITY TO PROVIDE TRANSPORT AND
12 BACKHAUL TELECOMMUNICATIONS
13 SERVICES IN ARIZONA.

DOCKET NO. T-20567A-07-0662

DECISION NO. _____

OPINION AND ORDER

14 DATE OF HEARING:

February 18, 2009 and April 27, 2009 (Hearings)
May 22, 2009, June 18, 2009, and November 12, 2009
(Procedural Conferences)

15 PLACE OF HEARING:

Phoenix, Arizona

16 ADMINISTRATIVE LAW JUDGE:

Yvette B. Kinsey

17 APPEARANCES:

Mr. Jamie T. Hall and Ms. Martha Hudak, CHANNEL
LAW GROUP, LLP, on behalf of NewPath Networks,
LLC;

Ms. Deborah Robberson, City Attorney, and Mr. Eric
Anderson, Assistant City Attorney, on behalf of
Intervenor City of Scottsdale;

Mr. Thomas K. Chenal, SHERMAN & HOWARD,
LLC, on behalf of Intervenor Town of Carefree;

Mr. Andrew M. Miller, Town Attorney, and Mr. Steven
Zraick, Assistant Town Attorney, on behalf of
Intervenor Town of Paradise Valley; and

Ms. Maureen Scott and Mr. Kevin Torrey, Staff
Attorneys, Legal Division, on behalf of the Utilities
Division of the Arizona Corporation Commission.

24 **BY THE COMMISSION:**

25 On November 26, 2007, NewPath Networks, LLC ("NewPath" or "Company") filed with the
26 Arizona Corporation Commission ("Commission") an application for a Certificate of Convenience
27 and Necessity ("Certificate" or "CC&N") to provide transport and backhaul services to other carriers,
28

1 including, but not limited to, wireless telecommunications services providers and potentially to
2 wireless information service providers in Arizona.

3 On August 7, 2008, the Commission's Utilities Division ("Staff") filed a Letter of
4 Insufficiency and first set of data requests in this matter ("Data Requests").

5 On August 15, 2008, NewPath filed responses to Staff's Data Requests.

6 On October 31, 2008, Staff filed a Staff Report recommending approval of the application
7 subject to certain conditions.

8 On November 7, 2008, a Procedural Order was issued setting the hearing in the matter for
9 March 25, 2009, and other procedural deadlines were established.

10 On November 10, 2008, NewPath, through Arizona counsel, filed a Motion and Consent of
11 Local Counsel for *Pro Hac Vice*, requesting that Mr. Jamie T. Hall be admitted *Pro Hac Vice* in this
12 matter.

13 On November 13, 2008, a Procedural Order was issued granting Mr. Jamie T. Hall *Pro Hac*
14 *Vice* admission.

15 On November 19, 2008, NewPath filed a Request for an expedited hearing date.

16 On December 4, 2008, Staff filed a response to NewPath's request to expedite the hearing,
17 stating Staff did not object to NewPath's request.

18 On December 10, 2008, by Procedural Order, NewPath's request to expedite the hearing date
19 was granted and the hearing date was scheduled for February 18, 2009.

20 On January 30, 2009, NewPath docketed its Affidavit of Publication showing notice of the
21 application and hearing date had been published in the *Arizona Republic*, a newspaper of general
22 circulation in the proposed service area, on January 15, 2009.

23 On February 18, 2009, a full public hearing was held before a duly authorized Administrative
24 Law Judge ("ALJ") of the Commission at its offices in Phoenix, Arizona. The Company and Staff
25 appeared through counsel and presented evidence and testimony. During the hearing, several
26 members of the public appeared to give public comment, raised concerns that the hearing date had
27 been expedited, and stated they desired to file for intervention in this matter.

28

1 On February 27, 2009, public comments were filed on behalf of the DC Ranch Association, a
2 residential subdivision located in the City of Scottsdale.

3 On March 3, 2009, a Procedural Order was issued, which directed that the record in this
4 matter remain open until March 9, 2009, to allow for any additional public comments regarding
5 NewPath's application.

6 Between March 9 and March 13, 2009, seven public comments were docketed in opposition
7 to NewPath's application.

8 On March 18, 2009, by Procedural Order, a second day of hearing was scheduled to begin on
9 April 27, 2009, to allow for additional public comments, extend the deadline for intervention, and to
10 allow Staff and the Company to present evidence and testimony related to the public comments.
11 Further, NewPath was directed to file notice of the additional hearing date by March 31, 2009.

12 Between March 20 and March 27, 2009, three public comments were docketed in opposition
13 to NewPath's application.

14 On April 6, 2009, NewPath filed certification that notice of the additional hearing date had
15 been published in the *Arizona Republic*, on March 31, 2009.

16 On April 10, 2009, the Town of Carefree ("Carefree"), Town of Paradise Valley ("Paradise
17 Valley"), and City of Scottsdale ("Scottsdale") filed Motions to Intervene ("Motions") in this
18 proceeding. The Motions asserted that due to NewPath's proposed CC&N and its plans to place
19 facilities within their communities, the intervenors had a "direct and substantial" interest in protecting
20 the health, safety, and welfare of its residents. By Procedural Order issued April 17, 2009, the
21 Motions were granted over the objections of NewPath.

22 Between April 14 and April 17, 2009, various letters in support and in opposition to
23 NewPath's application were filed.

24 On April 20, 2009, a Notice of Appearance was filed by Donnelly Dybus and John A. Greene,
25 as co-counsel for NewPath.

26 Between April 20 and April 23, 2009, various public comments were filed opposing
27 NewPath's application.

1 On April 23, 2009, NewPath filed a supplement to its application regarding updated financial
2 information.

3 On April 24, 2009, Scottsdale docketed its Hearing Memorandum ("Memorandum") which,
4 among other things, challenged the Commission's jurisdiction over the NewPath application.

5 Between April 24 and April 27, 2009, various public comments in support and in opposition
6 to NewPath's application were filed.

7 On April 27, 2009, a second day of hearing was convened by a duly authorized ALJ of the
8 Commission. NewPath, Staff, and the intervenors appeared through counsel. Public comment was
9 taken. Counsel for Staff requested that the hearing be continued to afford Staff and NewPath an
10 opportunity to respond to Scottsdale's Memorandum, which had been docketed at the close of
11 business on the day before the hearing. Further, the parties discussed continuing the hearing to May
12 18, 2009.

13 On May 1, 2009, NextG Networks of California, Inc. dba NextG Networks West ("NextG"),
14 filed an application for intervention.¹

15 On May 4, 2009, by Procedural Order, Staff, NewPath, Carefree, and Paradise Valley were
16 directed to file written briefs in response to Scottsdale's Memorandum by May 29, 2009. Further, the
17 Procedural Order stated that another hearing date would be scheduled at the conclusion of briefing
18 schedule.

19 On May 22, 2009, at the request of Scottsdale, a telephonic procedural conference was held
20 with the parties. Carefree, Paradise Valley, Scottsdale, NewPath, and Staff appeared through
21 counsel. Scottsdale requested that the briefing be rescheduled because settlement of the issues raised
22 in its Memorandum was possible. At the conclusion of the procedural conference, the hearing was
23 scheduled to reconvene on July 7, 2009, and the parties were directed to file responses to NextG's
24 request to intervene.

25
26
27 ¹ In Commission Decision No. 68915 (August 29, 2006), NextG was granted a CC&N to provide private line
28 telecommunications services similar to NewPath's proposed services. NextG's request to intervene stated that, based on
Scottsdale's Memorandum challenging the Commission's jurisdiction over NewPath's proposed services and statements,
NextG's interests may be substantially impacted and NextG should therefore be granted intervention in this matter.

1 On June 10, 2009, Scottsdale filed a motion to withdraw as a party from this proceeding, as
2 well as a notice of withdrawal of its Memorandum. Scottsdale's motion stated that the City Council
3 had adopted two separate agreements with NewPath which establishes a framework for a working
4 relationship on a going forward basis.

5 On the same date, Scottsdale filed objections to Staff's data requests.

6 On June 12, 2009, by Procedural Order, a procedural conference was set for June 18, 2009.

7 On June 12, 2009, Carefree and Paradise Valley filed Hearing Memorandums incorporating
8 the issues raised in Scottsdale's Memorandum, as well as raising additional issues. On the same date,
9 Staff filed a motion to delay the briefing schedule until after the June 18, 2009 procedural conference.

10 On June 15, 2009, Staff filed a Notice of Errata.

11 On June 17, 2009, NewPath filed a request to appear telephonically for the June 18, 2009,
12 procedural conference.

13 On June 18, 2009, a procedural conference was held, as scheduled, to discuss Scottsdale's
14 possible withdrawal from this proceeding and to resolve Staff's pending data requests. Staff,
15 Paradise Valley, Carefree, and Scottsdale appeared through counsel for the procedural conference.
16 Counsel for NewPath appeared telephonically. During the procedural conference, Scottsdale's
17 request to withdraw from this proceeding was taken under advisement and Paradise Valley was
18 directed to respond to Staff's data requests.

19 On June 29, 2009, NewPath, through Arizona counsel, filed a Motion and Consent of Local
20 Counsel for Martha Hudak to be admitted *Pro Hac Vice*.

21 On the same date, by Procedural Order, Martha Hudak was admitted *Pro Hac Vice* for
22 NewPath in this proceeding.

23 On June 30, 2009, by Procedural Order, the July 7, 2009 hearing date was vacated; Scottsdale
24 was granted withdrawal; a revised briefing schedule was established; and the parties were directed to
25 file a response to NextG's application to intervene.

26 On July 10, 2009, NewPath, Carefree, and Staff filed responses to NextG's request for
27 intervention in this proceeding. NewPath and Staff objected to the intervention and Carefree did not
28 object.

1 On July 16, 2009, NextG filed a request to withdraw its application to intervene. NextG
2 stated that it had deemed intervention unnecessary based on Staff's position that NextG's CC&N had
3 been properly approved when granted, and that revocation of NextG's CC&N could not be properly
4 addressed in this proceeding.

5 On August 20, 2009, two public comments were docketed in opposition to NewPath's
6 application.

7 On August 21, 2009, NewPath filed a Request for Extension of Deadlines. NewPath stated
8 that it was "progressing toward an agreement" with Paradise Valley and Carefree. Further, NewPath
9 avowed that all parties to this matter participated in a conference call on August 14, 2009, and agreed
10 that the briefing schedule should be extended.

11 By Procedural Order issued August 24, 2009, NewPath's request to extend the briefing
12 schedule was granted and the parties were directed to file briefs on or before September 15, 2009.

13 On August 28, 2009, a public comment in opposition to NewPath's application was docketed.

14 On September 9, 2009, NewPath docketed an explanation of its public outreach efforts in
15 Carefree.

16 On September 15, 2009, Staff filed a request for an extension of time to file its brief in this
17 matter until September 18, 2009. On the same date, NewPath filed its brief in response to the Hearing
18 Memorandums submitted by Paradise Valley and Carefree.

19 On September 16, 2009, Staff's request for an extension of time to file its brief was granted
20 by Procedural Order.

21 On September 21, 2009, Staff filed a brief addressing the issues raised by Paradise Valley and
22 Carefree.

23 On October 1, 2009, Carefree filed a request for an extension of time to file a reply brief on
24 the issues raised by Staff and NewPath. Carefree's request stated that the additional time would allow
25 Carefree and NewPath time to negotiate a resolution of the issues Carefree had raised.

26 On October 2, 2009, Paradise Valley filed a motion to withdraw as a party as well as a notice
27 of withdrawal of its Hearing Memorandum. Paradise Valley's motion stated that Paradise Valley
28

1 entered into an agreement with NewPath that establishes a framework for a working relationship on a
2 going forward basis.

3 By Procedural Order issued October 6, 2009, Carefree's request for an extension of time until
4 October 21, 2009, Paradise Valley's motion to withdraw as party, and Paradise Valley's request to
5 withdraw its Hearing Memorandum, were granted.

6 On October 23, 2009, Carefree filed a motion to withdraw its Hearing Memorandum.
7 Carefree's motion stated that Carefree reached an agreement with NewPath on October 22, 2009.
8 However, Carefree's motion stated that it desires to remain an intervenor in this matter.

9 On October 30, 2009, NewPath filed a motion to set a procedural conference, and a motion
10 for expedited recommended opinion and order or, in the alternative, an expedited hearing date.

11 On November 2, 2009, a public comment was docketed regarding litigation between NewPath
12 and the City of Irvine, California.

13 On November 12, 2009, a telephonic procedural conference was held. Staff, NewPath, and
14 Carefree appeared through counsel. Discussions were held regarding NewPath and Carefree's
15 motions. At the conclusion of the procedural conference, NewPath was directed to file a late-filed
16 exhibit detailing its community outreach efforts.

17 On November 18, 2009, NewPath docketed an update on its community outreach efforts with
18 various municipalities and homeowner's associations.

19 On November 20, 2009, NewPath filed a supplement to its application, which provided
20 updated financial information on the company.

21 On November 24, 2009, a Procedural Order was issued directing NewPath to file additional
22 information, and Carefree's motion to withdraw its hearing memorandum was granted.

23 On December 1, 2009, NewPath filed late-filed exhibits, pursuant to the November 24, 2009,
24 Procedural Order.

25 After a review of the late-filed exhibits, the matter was taken under advisement pending
26 submission of a Recommended Opinion and Order to the Commission.

27 * * * * *

28 Having considered the entire record herein and being fully advised in the premises, the

Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. NewPath is a wholly owned subsidiary of NewPath Networks, Inc. NewPath is a foreign limited liability company, organized under the laws of the State of New Jersey, with headquarters in Seattle, Washington. NewPath is authorized to transact business in Arizona.

2. On November 26, 2007, NewPath filed with the Commission an application to provide transport and backhaul telecommunication services to other carriers, including, but not limited to, wireless telecommunications services providers, and potentially to wireless information service providers in Arizona.²

3. NewPath's application proposes to provide telecommunication services using a Distributed Antenna System ("DAS") network.³ Through the DAS network, NewPath will take a communication signal handoff from its customers and transport it over fiber optic facilities known as nodes, which are located in the public right-of-ways or utility easements.⁴ According to NewPath, its DAS network will consist of nodes (small, low-powered antennas), and equipment that will convert Radio Frequency ("RF") signals to optical signals that will then be transported over fiber optic lines.⁵ NewPath states that it will provide services to wireless carriers that are the providers of personal wireless services or commercial mobile radio services ("CMRS").⁶

4. According to NewPath's application, NewPath's DAS is designed as a minimally intrusive alternative to traditional wireless antenna technologies by using an array of smaller antennas in place of the larger more visible antennas.⁷ With the DAS design, NewPath believes it can offer wireless communications solutions to carriers where, due to zoning, topological, or cost constraints, service would be unavailable or of diminished quality.⁸

Staff Recommendation

5. Staff recommends approval of NewPath's application for a CC&N to provide transport

² Application at 1.

³ Application, Attachment E.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

1 and backhaul telecommunication services. Staff also recommends that NewPath's proposed services
2 be classified as competitive.

3 6. Staff further recommends that:

- 4
- 5 a. NewPath comply with all Commission Rules, Orders, and other requirements
6 relevant to the provision of intrastate telecommunications services;
 - 7 b. NewPath abide by the quality of service standards that were approved by the
8 Commission for Qwest in Docket No. T-01051B-93-0183;
 - 9 c. NewPath be required to notify the Commission immediately upon changes to
10 NewPath's name, address or telephone number;
 - 11 d. NewPath cooperate with Commission investigations including, but not limited
12 to customer complaints;
 - 13 e. The fair value rate base information provided for NewPath not be given
14 substantial weight in this analysis;
 - 15 f. NewPath be authorized to discount its rates and service charges to the marginal
16 cost of providing the services; and
 - 17 g. NewPath's rates should be classified as competitive.

18 7. Staff recommends that NewPath docket conforming tariffs for each of its proposed
19 services within 365 days from the date of an Order in this matter, or 30 days prior to providing
20 service, whichever comes first. The tariffs submitted to the Commission should coincide with the
21 services described in NewPath's application.

22 8. Staff further recommends that, if NewPath fails to comply with the above conditions,
23 NewPath's CC&N should be considered null and void, after due process.

24 **Public Comment/Community Outreach**

25 9. At the February 18, 2009 hearing, several members of the public provided comments
26 on NewPath's application. Ms. Suzanne Walden-Wells, a representative from the DC Ranch
27 Community Council and the north Scottsdale neighborhood of DC Ranch provided public comment
28 in opposition to NewPath's application. According to Ms. Walden-Wells, DC Ranch is comprised of
4,400 acres and 2,220 homeowners who are concerned that granting NewPath's application will

1 allow the Company to install 24-foot tall towers in the public right-of-ways ("PROWs") of the
2 neighborhood, and that the towers will impact the aesthetics of the community. (Tr. at 8)⁹

3 10. The DC Ranch Association, the DC Ranch Community Council, and the Covenant
4 Commission, submitted written public comments on NewPath's application. The document states that
5 DC Ranch is designed to enhance the desert environment by maximizing views and vistas, utilizing
6 natural landscaping, and using limited street lights and street signs to encourage "a dark sky."
7 According to the comments, granting NewPath a CC&N to provide telecommunications services,
8 using a DAS network, will impact the design and aesthetic nature of the DC Ranch community.

9 11. Mr. Con Englehorn, a board member for the Happy Valley Ranch Subdivision
10 Homeowners Association ("the HOA") also appeared at the hearing to give public comments on
11 NewPath's application. Mr. Englehorn stated that there are 107 residents in the Happy Valley
12 Subdivision and that they object to NewPath's proposal to put two towers in their neighborhood. (Tr.
13 at 5) According to Mr. Englehorn, the Happy Valley neighborhood is a "dark" neighborhood, with
14 no lights, and that NewPath's proposed towers would be quite obvious. (Tr. at 6) He further stated
15 that, although the HOA is in opposition to the towers, NewPath's Director of External Affairs and
16 Land Use, Mr. Stephen Garcia, had been helpful in setting meetings to hear homeowners' concerns
17 about the towers. (Tr. at 6) He further stated that meetings have taken place with Scottsdale and
18 homeowners regarding the aesthetics of the towers and health issues related to DAS. (Id.)

19 12. NewPath responded to the public comments stating that NewPath will continue to
20 work within the communities regarding its proposed projects. (Tr. at 12) NewPath also stated that
21 planning for the proposed projects had begun 12 months prior to the hearing; a number of public
22 forums had been held with interested parties and non-governmental entities such as HOAs; and
23 negotiations with municipalities for franchise agreements were underway. (Tr. at 13)

24 13. On April 27, 2009, additional public comments were taken during the second day of
25

26 ⁹ According to Ms. Walden-Wells, in-house counsel for the DC Ranch Community was aware of NewPath's application
27 since mid-summer 2008 and DC Ranch community representatives have been participating in meeting with NewPath for
28 the approximately eight months to locate appropriate sites for NewPath's equipment within the community. (Tr. at 10)
Ms. Walden-Wells stated that counsel for the DC Ranch Community had intended to file a motion for intervention, but
was unaware of the earlier hearing date until the day before the hearing. (Tr. at 8)

1 hearing. Mr. Paul Given, President of the Grayhawk Homeowners Association ("Grayhawk") stated
2 that Grayhawk has approximately 10,000 residents; Grayhawk representatives have been meeting
3 with NewPath over the last year regarding site locations; 13 sites have been proposed in the
4 community; and the community is in opposition to the application.

5 14. According to the Staff Report, Staff met with Scottsdale regarding Scottsdale's
6 concerns with NewPath's CC&N application. During the discussion, Scottsdale raised the following
7 issues:

- 8 a. The type of services proposed or provided by NewPath;
- 9 b. The type of proposed equipment and structures;
- 10 c. The financial risks should NewPath abandon its network, either fully or in part; and
- 11 d. The right-of-ways, franchise and/or construction fees.

12 (S.R. at 4)

13 15. It is Staff's opinion that the type and placement of antennas within communities is
14 under the purview of the cities or counties¹⁰ and not an issue to be considered as part of the CC&N
15 application. (Tr. at 68) Staff also stated that Scottsdale (and, presumably, Paradise Valley and
16 Carefree) can, and have, addressed those issues through their respective participation as intervenors
17 in this proceeding. (S.R. at 5)

18 16. On March 13, 2009, NewPath filed a response to the public comments. NewPath
19 stated that its proposed services provide a platform to support high speed voice, data, video, and
20 Internet access services, via a fiber-optic backbone. (Response at 2) NewPath asserts that its
21 proposed services will provide greater and more predictable bandwidth; enhance and be compatible
22 with existing and evolving technology; provide wireless coverage in areas where such coverage does
23 not exist; increase competition in the DAS network area; and promote economic growth in Arizona
24 by providing work for local contractors to build and deploy its networks. (Id.) Further, NewPath

25 _____
26 ¹⁰ Staff's position is consistent with current case law. The Ninth Circuit Court of Appeals has interpreted the regulation
27 of the placement of wireless antennas, the impact of aesthetic values, scenic views, and visual clutter as legitimate City
28 interests in regulating public right-of-ways. Further, management of the public rights-of-way has been recognized to
include requiring equipment to be placed underground, maintaining the physical integrity of the right-of-way, and
preventing the tangled mass of criss-crossing wires and equipment. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th
Cir. 2001).

1 contends that its proposed services are designed to fill a significant gap in wireless coverage that has
2 been identified by the wireless carriers in Arizona, and the additional coverage will be a significant
3 benefit to the public.(Id.)

4 17. NewPath's response also stated that it has conducted extensive community outreach in
5 Arizona in an effort to customize the design of nodes (antennas) and other equipment to maintain the
6 aesthetics of the communities. (Id. at 2) NewPath states the following community outreach efforts
7 have been taken:

- 8 a. Participation in workshops in Scottsdale to identify design solutions for
its wireless equipment;
- 9 b. Conducting approximately 16 open houses for Arizona HOAs and other
community associations to discuss proposed projects;
- 10 c. Submitting approximately 200 "pre-applications" to Scottsdale, which
11 included notice being sent to every resident within 750 feet of the
proposed projects;
- 12 d. Amending proposed node designs based on feedback from the HOAs
and communities; and
- 13 e. Conducting meetings and site visits with the residents of DC Ranch.
(Id.)

14 18. Further, NewPath stated that its DAS network is designed to minimize the visual
15 impact of equipment by attaching antennas to existing street lights and/or utility poles located in
16 PROWs. (Id.) In areas where existing streetscapes are not available, NewPath uses low profile
17 equipment; stealth facilities (i.e., faux saguaros or monuments); and appropriate landscaping to
18 disguise meter pedestals and utility boxes. (Id.)

19 19. On November 13, 2009, NewPath updated the Commission on its community outreach
20 efforts. In its second filing, NewPath stated that it reached individual agreements ("Agreements")
21 with Scottsdale, Paradise Valley, and Carefree, addressing the issues raised in the hearing
22 memorandums.¹¹ Regarding the Scottsdale Agreement, NewPath agreed to distribute public notices
23 to all residents located within 750 feet of a proposed site and hold open house meetings to discuss
24
25
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28 ¹¹ During the pendency of the proceeding, the parties continued to negotiate settlement of the issues.

any proposed facilities located within 150 feet of a residentially zoned parcel.¹² Further, NewPath's executed Agreement with Scottsdale provides the framework for managing the PROWs for placement of the DAS facilities and applicable franchise fees.¹³

20. Pursuant to the Paradise Valley Agreement, NewPath conducted a public hearing regarding the DAS network on October 8, 2009. According to the Agreement, NewPath is required to: host three open house events for residents; provide feedback to the town council from the open houses; provide proposed node designs and location preferences for the equipment to the town council; and participate in a "pre-application" conference to discuss NewPath's DAS master plan for the area.¹⁴ Further, the Agreement globally sets forth a working relationship between NewPath and Paradise Valley on a going forward basis.¹⁵

21. The Agreement NewPath reached with Carefree calls for NewPath to provide public notice to residents located within 500 feet of a residentially zoned parcel prior to submitting a use permit, and to hold open houses and public hearings.¹⁶ The Carefree Agreement also establishes a working relationship regarding the placement of NewPath's DAS facilities within the community and protects Carefree's authority to impose franchise fees.¹⁷

22. NewPath also reported on several community outreach efforts with individual HOAs in and around the Maricopa County area. NewPath lists the following HOA community efforts:

a. The Boulders Homeowner's Association - approximately six meetings have been held with the association and agreement has been reached allowing NewPath to install its equipment in faux cacti and on rooftops located within the community. Public hearings on the permit applications are scheduled for November 19, December 3, December 17, 2009, and on or about January 11, 2010.

b. Happy Valley Ranch Homeowner's Association - approximately five

¹² NewPath, Scottsdale Fiber Right-of-Way License Agreement executed May 29, 2009.

¹³ Id.

¹⁴ NewPath's late-filed exhibit dated December 1, 2009.

¹⁵ NewPath, Paradise Valley Agreement dated September 29, 2009.

¹⁶ NewPath's late-filed exhibit dated December 1, 2009.

¹⁷ NewPath, Carefree Agreement dated October 21, 2009.

meetings have been held with the association and NewPath has agreed to suspend two pending applications until NewPath obtains a CC&N from the Commission. The parties have agreed to resume site locations once a CC&N has been obtained.

c. DC Ranch Covenant Commission ("Covenant") and DC Ranch Community Council ("Council") - after seven meetings, on October 19, 2009, the Covenant and Council issued NewPath a Letter of Support to install facilities at seven traffic signals within the PROWs in DC Ranch.

d. Scottsdale Ranch Homeowner's Association - approximately eight meetings have been held with the association, and on March 31, 2009, the association issued NewPath a Letter of Authorization to install facilities at 14 locations in and around the community.

e. Grayhawk Homeowner's Association ("Grayhawk") - approximately six meetings have been held with Grayhawk and the Retreat Village Association ("Retreat"). Both Grayhawk and the Retreat have issued a Letter of Support to NewPath for the use of 13 PROWs and a Letter of Authorization for one private property. NewPath has secured all 14 use permits from Scottsdale.¹⁸

23. As a result of the Agreements reached with Scottsdale, Paradise Valley and Carefree, the intervenors requested withdrawal of their hearing memorandums opposing NewPath's application and challenging the Commission's jurisdiction over NewPath's application. Further, Scottsdale and Paradise Valley requested to withdraw as parties in this matter. By Procedural Order, Scottsdale's and Paradise Valley's requests to withdraw their respective Hearing Memorandums and their requests to withdraw as parties from this proceeding were granted. In a subsequent Procedural Order, Carefree was granted permission to withdraw its Hearing Memorandum.¹⁹

24. Several of the public comments in this docket referred to concerns with the safety of DAS networks in residential communities. On December 1, 2009, NewPath docketed information that has been distributed to the public regarding radio frequency ("RF") safety.²⁰

25. According to the information provided by NewPath, DAS uses a network of sites that

¹⁸ NewPath's late-filed exhibit dated November 18, 2009.

¹⁹ Due to the withdrawal of the intervenors' hearing memorandums, the issues raised therein regarding the scope of the Commission's jurisdiction will not be addressed in this Decision.

²⁰ NewPath late-filed exhibit docketed December 1, 2009.

1 communicate with one another and customers near the sites using radio waves.²¹ RF energy comes
 2 from natural sources like the sun and earth, as well as man-made sources like AM/FM radios,
 3 televisions, cell phones and their base stations, baby monitors and paging antennas.²² The
 4 information submitted by NewPath states that the RF energy transmitted by DAS antennas is more
 5 than 100 times weaker than x-rays and that RF energy has no way of changing biological molecules
 6 in the cells.²³

7
 8 26. The Federal Communications Commission ("FCC") has established acceptable limits
 9 for RF exposure for humans.²⁴ NewPath stated that the FCC RF standard is similar to other RF safety
 10 standards used around the world, and that the FCC maximum allowable public RF exposure is set at
 11 50 times below the level at which the majority of the scientific community believes may pose a health
 12 risk to humans.²⁵ Because DAS antennae are typically mounted 20-40 feet above ground, and
 13 typically transmit RF energy straight out or horizontally²⁶ from the antennae, the exposure in many
 14 cases is 100 times lower than FCC maximum exposure levels.²⁷ By comparison, NewPath provided a
 15 chart showing the RF exposure from a typical DAS transmission site to be 1 microwatts per square
 16 centimeter ($\mu\text{W}/\text{cm}^2$), compared to a Bluetooth headset of 100 ($\mu\text{W}/\text{cm}^2$).²⁸ According to NewPath,
 17 DAS sites typically use less than 60 watts to transmit signals, whereas AM radio broadcast facilities
 18 may use as many as 50,000 watts. (Id.)

19
 20 27. NewPath stated that, with respect to wireless base stations (i.e., DAS sites) operating
 21 continuously at or below the maximum public safety limits, the World Health Organization (WHO)
 22

23 ²¹ The radio waves are referred to by different names such as electromagnetic energy, radiofrequency microwaves,
 24 electromagnetic fields, and non-ionizing radiation. The term RF is used to refer to transmitted signals from DAS sites.
 (Exhibit A)

25 ²² NewPath late-filed exhibit docketed December 1, 2009.

26 ²³ RF energy is referred to as "non-ionizing radiation." Id.

27 ²⁴ FCC, Office of Engineering & Technology Bulletin 65 (August 1997), entitled "Evaluating Compliance with FCC
 Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields."

28 ²⁵ NewPath late-filed exhibit docketed December 1, 2009.

²⁶ The Vertical RF exposure from a DAS antenna is shown on the chart to be typically 1,000 times less than the FCC
 maximum RF standard. NewPath late-filed exhibit dated December 1, 2009, (Ex. A).

²⁷ Id.

1 has stated: "from all the evidence accumulated so far, no adverse short or long term health effects
2 have been shown to occur from RF signals produced by base stations."²⁹

3 28. In accordance with the FCC requirements regarding RF exposure, NewPath states it
4 submits a RF safety report with each of its land use applications. According to NewPath, it has filed
5 over 130 land use permit applications in Arizona and has made the RF safety reports available to the
6 public.³⁰ NewPath also provided several RF safety reports that have been submitted with various use
7 permit applications for specific locations within Arizona.³¹ NewPath asserts that the various reports
8 show that the RF public exposure levels are within the acceptable levels prescribed by the FCC.³²
9

10 Technical Capabilities

11 29. According to NewPath's application, the top four key personnel for the Company have
12 a combined total of over 50 years experience in the telecommunications industry.³³

13 30. NewPath's witness testified that the Company intends to develop a multi-tenant
14 neutral host network that can accommodate multiple wireless carriers though one fiber optic
15 infrastructure. (Tr. at 18) The network will be bi-directional, in that data can move back and forth
16 through the fiber optic backbone and will consist of 200-miles of fiber lines. (Tr. at 41, 25) NewPath
17 proposes to deploy its DAS network to connect to antennas or nodes placed in the public right-of-
18 ways or on existing verticality (ie., street lights, traffic signals or other public structures). (Tr. at 20)
19 In non-urban areas, NewPath has used both faux saguaros and other faux alternatives to disguise
20 antennas so that they blend in with the environment. (Tr. at 20)

21 31. NewPath's witness testified that, with its fiber infrastructure, a wireless carrier can get
22 greater data speeds than can normally be provided by an Incumbent Local Exchange Carrier
23 ("ILEC"), because ILECs typically have to connect to a telephone line, which often makes service
24 more expensive and/or diminishes data quality. (Tr. at 25) The NewPath witness also testified that
25

26 ²⁸ Id.

²⁹ NewPath late-filed exhibit, quoting WHO fact sheet #304 (May 2006).

³⁰ NewPath late-filed exhibit dated December 1, 2009.

27 ³¹ Id.

³² Id.

28 ³³ NewPath application, attachment F.

1 the DAS network allows wireless carriers to extend services to residential areas and other hard to
2 reach places because of DAS' use of low-profile, low-power output devices. (Tr. at 19)

3 32. According to the Staff Report, NewPath currently operates a DAS network in the City
4 of Glendale, which provides telecommunication services to Westgate Center, University of Phoenix-
5 Stadium and the Jobing.com Arena.³⁴ NewPath also provides transport and backhaul services in
6 Oregon, Nevada, California, Minnesota, Louisiana, Washington, and Colorado.

7 33. NewPath has no affiliates operating in Arizona.

8 34. Based on NewPath's experience in the telecommunications industry, Staff concluded
9 that NewPath has the technical capabilities to provide the telecommunications services it seeks to
10 provide in Arizona.

11 **Financial Capabilities**

12 35. NewPath provided with its application unaudited consolidated financial statements for
13 2006, 2007, and the five months ending May 31, 2008. The Company's financial statements listed
14 total assets of \$8,206,114, total equity of (\$1,200,844), and earnings before income tax of
15 (\$1,668,302) for the year 2008.

16 36. On April 23, 2009, NewPath docketed updated financial information. The filing stated
17 that NewPath secured additional financing in the amount of \$30 million from the Charterhouse Group
18 (\$20 million) and Meritage Funds (\$10 million) in a purchase stock agreement executed with the
19 investors on April 20, 2009.³⁵ According to NewPath, the purchase stock agreement, allowed the
20 investors to purchase stock in the newly formed holding company, NewPath Networks, Inc.
21 ("NewPath, Inc.")³⁶ As a result of the transaction, NewPath became a wholly owned subsidiary of
22 NewPath, Inc.³⁷ According to NewPath, both Charterhouse and Meritage have committed to future
23 financing up to \$17 million, to support NewPath's continued growth.³⁸

24 37. NewPath's witness testified that NewPath will rely on a combination of its own

25 ³⁴ NewPath is currently leasing fiber from Salt River Project ("SRP"), but plans to construct its own fiber lines if the
26 CC&N is granted. (App. at A-19)

³⁵ NewPath's supplemental filing at pg. 1.

27 ³⁶ Id.

³⁷ According to NewPath's filing, NewPath, Inc. serves as a holding company only, and that no assets, including the
28 pending CC&N and any NewPath facilities in Arizona, will be transferred to NewPath, Inc.

³⁸ NewPath's supplemental filing at pg. 1.

1 finances as well as future venture capital to provide services in Arizona. (Tr. at 38)

2 38. According to NewPath's application and its proposed tariff, NewPath may collect
3 deposits or advances from its customers.

4 39. In its application, NewPath stated that it does not believe requiring a performance
5 bond is necessary because NewPath will be providing its services to other carriers, not to individuals
6 or small businesses. (A-15) NewPath contends that the level of sophistication of its proposed
7 customers will serve well in negotiating contractual agreements, and will ensure NewPath provides a
8 quality level of service in Arizona. The Company also claims that the lack of a performance bond
9 would not pose a risk to customers. (Id.)

10 40. NewPath's witness testified that it is standard business practice for DAS companies to
11 provide a performance bond as a part negotiated contracts or franchise agreements with each of the
12 cities where service is being provided. (Tr. at 47) NewPath's witness reiterated that NewPath will
13 not have any direct contact with residential or individual customers.(Id.)

14 41. Staff does not recommend requiring NewPath to file a performance bond or an
15 irrevocable sight draft letter of credit as a requirement for obtaining a CC&N. Staff stated that,
16 because NewPath's customers will be primarily large, sophisticated wireless carriers, and NewPath
17 does not intend to serve small businesses or residential customers, a performance bond or irrevocable
18 sight draft letter of credit is not necessary. (Tr. at 60) Staff's witness testified that for a private line
19 CC&N, such as that requested in this proceeding, no bond should be required when only large
20 business customers are being served. (Id.) Staff's witness further explained that, even though
21 NewPath's tariff reflects that it will collect deposits or advances from its customers, because
22 NewPath's proposed customers will be large wireless carriers, it is Staff's opinion that the customer
23 will have more control than NewPath and, therefore, the requirement of a performance bond or letter
24 of credit offers no useful remedy in such a competitive business. (Tr. at 66)

25 **Rates and Charges**

26 42. NewPath will have to compete with various ILECs, competitive local exchange
27 carriers (CLECs") and interexchange carriers ("IXCs") currently providing telephone service.

28 43. NewPath's proposed rates are for competitive services. In general, rates for

1 competitive services are not set in the same manner as for non-competitive services, although fair
2 value rate base is taken into account as part of the approval process.

3 44. According to the Staff Report, NewPath will have to engage in a competitive bidding
4 process to gain new customers, which will result in rates provided on an individual case basis
5 ("ICB"). (S.R. at 3) NewPath proposes to use excess fiber capacity to provide end user
6 telecommunications services to apartment complexes, office buildings and other businesses, and
7 although those customers do not require an ICB contract, and they will be able to purchase services at
8 the rates contained in NewPath's proposed tariffs. (Id.)

9 45. Based on the competitive environment in which NewPath will operate, Staff believes
10 NewPath will not be able to exert any market power and the competitive process should result in rates
11 that are just and reasonable. (S. R. at 2)

12 46. Although Staff considered NewPath's fair value rate base of \$423,669, Staff did not
13 give the information substantial weight in its analysis. (S.R. at 2)

14 47. Pursuant to Arizona Administrative Code ("A.A.C.") R-14-2-1109, NewPath may
15 charge rates for services that are not less than its total service long-run incremental costs of providing
16 service.

17 48. Staff believes NewPath's proposed rates, as they appear in its tariff, are just and
18 reasonable and recommends that the rates be approved. (S.R. at 3)

19 **Complaint Information**

20 49. According to NewPath's application, it has not had an application for service denied,
21 or revoked, in any state. (A-11)

22 50. No complaints have been filed against NewPath in Arizona and NewPath is in good
23 standing with the Commission's Corporations Section. (S.R. at 3)

24 51. NewPath has not had any criminal proceeding filed against it.

25 52. None of NewPath's officers, directors or managers have been involved in any civil or
26 criminal investigations or been convicted of any criminal acts in the past ten years. (A-12)

27 **Litigation**

28 53. NewPath provided updated information regarding a pending complaint filed by

1 NewPath against the City of Irvine ("Irvine") seeking a permanent injunction from the enforcement
 2 of Irvine's Wireless Ordinance. According to NewPath, pursuant to a CC&N granted by the
 3 California Public Utilities Commission ("PUC"), NewPath is authorized to place infrastructure within
 4 the PROWs as defined by state statute. (Tr. at 29) NewPath's witness stated that, in California, state
 5 law defines how and where DAS providers can place infrastructure. (Tr. at 30) NewPath's witness
 6 states that NewPath believes Irvine is in violation of the authority granted by the CC&N. (Id.)

7 54. On April 4, 2008, the U.S. District Court for the Central District of California entered
 8 judgment in favor of NewPath and permanently enjoined Irvine from enforcing its wireless
 9 ordinance.³⁹ Irvine appealed. On or about August 11, 2009, NewPath and Irvine entered into a court-
 10 brokered settlement, which called for NewPath re-filing its land use applications.⁴⁰ According to
 11 NewPath, after a number of public hearings before the Planning Commission and the City Council,
 12 Irvine again denied NewPath's land use applications.⁴¹ NewPath states that pursuant to the
 13 settlement, NewPath is seeking a judicial determination as to the lawfulness of Irvine's actions and
 14 that the Court has tentatively concluded that Irvine's actions have violated both State and Federal
 15 law.⁴² According to NewPath, oral argument was scheduled for November 30, 2009, and NewPath
 16 expects that the Court will issue its decision shortly thereafter.⁴³

17 55. NewPath's witness testified that the open house process used in Scottsdale would have
 18 been beneficial to NewPath in dealing with the disputes it has encountered in the City of Irvine. (Tr.
 19 at 52) NewPath's witness stated the additional feedback from the HOAs, and the community, on
 20 specific locations and design has helped the process here in Arizona. (Id.)

21 56. On March 21, 2008, NextG filed a lawsuit against NewPath in the United States
 22 District Court for the Northern District of California San Francisco Division, alleging patent
 23 infringement. (S.R. at 4) According to NewPath, the patent involves the technology platform for
 24 operating a DAS network. (Tr. at 36) On December 1, 2009, NewPath updated the Commission on
 25 the status of the pending NextG litigation, stating that the parties had settled the matter in August

26 ³⁹ Not yet reported in F.Supp.2d, 2008 WL 2199689 (C.D.Cal.).

27 ⁴⁰ NewPath's late-filed exhibit dated December 1, 2009.

28 ⁴¹ Id.

⁴² NewPath's late-filed exhibit dated December 1, 2009.

⁴³ Id.

1 2009.⁴⁴

2 57. Staff's witness testified that the two lawsuits do not raise concerns about NewPath's
3 ability to provide its proposed services in Arizona. (Tr. at 64, 67)

4 58. According to the Staff Report, no complaints have been filed against NewPath by the
5 Federal Communications Commission. (S.R. at 4)

6 59. Based on the above facts, Staff concluded that NewPath has the technical and
7 managerial capabilities, as well as the financial requirements, to provide its proposed services in
8 Arizona. (S.R. at 4)

9 **Competitive Services Analysis**

10 60. Staff believes NewPath's proposed services are private line services. (S.R. at 5)
11 Private line service involves connecting two or more sites in a multi-site network using a direct
12 circuit or channel specifically dedicated for the use of an end user. (Id.) As with NewPath's proposed
13 services, private lines service provides an infrastructure that customers can use to transmit and
14 receive data. (Id.)

15 61. According to Staff, NewPath will be "engaged in providing telecommunications
16 services for hire to the public, which fits the definition of a common carrier, and a public service
17 corporation." (S.R. at 5)

18 62. Because IXC's, ILEC's, and CLEC's hold or are authorized to provide private line
19 services, Staff believes NewPath's entry into the market will be highly competitive. (S.R. at 5)
20 NewPath will have no market power in those markets where alternative providers to private line
21 telecommunications services exist. (Id.)

22 63. Staff recommends that NewPath's proposed services in Arizona be classified as
23 competitive.

24 **Conclusion**

25 64. NewPath has conducted extensive community outreach to address the issues raised in
26 this docket. NewPath's community outreach efforts have established a cooperative working
27

28 ⁴⁴ Id.

1 relationship on a going forward basis with the cities, towns, and HOAs that initially raised concerns
2 over NewPath's proposed services in their communities. NewPath has stated it will continue to work
3 cooperatively with all Arizona communities regarding design and placement of its equipment in the
4 PROWs. As the grant of a CC&N provides a statewide authorization to provide the
5 telecommunication services described in NewPath's application; we encourage NewPath to commit
6 to the level of community outreach described herein for all Arizona communities.

7 65. Staff's recommendation that no performance bond or irrevocable sight draft letter of
8 credit be required in this matter is reasonable and should be adopted.

9 66. Pursuant to A.A.C. R-14-2-1107, if NewPath desires to discontinue service in Arizona
10 it must file an application with the Commission, and notify its customers and the Commission sixty
11 (60) days prior to filing the application to discontinue service.

12 CONCLUSIONS OF LAW

13 1. NewPath Networks, LLC, is a public service corporation within the meaning of
14 Article XV of the Arizona Constitution and A.R.S. §40-281 and 40-282.

15 2. The Commission has jurisdiction over NewPath Networks, LLC, and the subject
16 matter of this application.

17 3. Notice of the application was given in accordance with the law.

18 4. A.R.S §§ 40-282 allows a telecommunications company to file an application for a
19 CC&N to provide competitive telecommunications services.

20 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised
21 Statutes, it is in the public interest for NewPath Networks, LLC, to provide the telecommunications
22 services set forth in its application.

23 6. NewPath Networks, LLC, is a fit and proper entity to receive a CC&N authorizing it
24 to provide competitive private line telecommunications services in Arizona, subject to Staff's
25 recommendations set forth herein.

26 7. The telecommunications services that NewPath Networks, LLC, intends to provide are
27 competitive within Arizona.

28 8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules,

1 it is just and reasonable and in the public interest for NewPath Networks, LLC, to establish rates and
2 charges that are not less than NewPath Networks, LLC's total service long-run incremental costs of
3 providing the competitive services approved herein.

4 9. Staff recommendations are reasonable and should be adopted.

5 **ORDER**

6 IT IS THEREFORE ORDERED that the application of NewPath Networks, LLC, for a
7 Certificate of Convenience and Necessity for authority to provide competitive private line
8 telecommunications services within the State of Arizona, is hereby granted subject to Staff's
9 recommendations, as more fully described hereinabove.

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1 IT IS FURTHER ORDRED that if NewPath Networks, LLC, fails to comply with the Staff
2 recommendations described above, the Certificate of Convenience and Necessity granted herein shall
3 be considered null and void after due process.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

6
7
8 CHAIRMAN _____ COMMISSIONER _____

9
10 COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER _____

11
12 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,
13 Executive Director of the Arizona Corporation Commission,
14 have hereunto set my hand and caused the official seal of the
15 Commission to be affixed at the Capitol, in the City of Phoenix,
16 this ____ day of _____, 2009.

17
18 ERNEST G. JOHNSON
19 EXECUTIVE DIRECTOR

20 DISSENT _____

21 DISSENT _____

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28

1 SERVICE LIST FOR: NEWPATH NETWORKS, LLC

2 DOCKET NO.: T-20567A-07-0662

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